STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD

IN RE PETITION TO RECALL SENATOR SCOTT FITZGERALD OF THE 13th SENATE DISTRICT	WGAB ID# 0600024
IN RE PETITION TO RECALL SENATOR WANGGAARD OF THE 21ST SENATE DISTRICT	WGAB ID# 0600021
IN RE PETITION TO RECALL SENATOR MOULTON OF THE 23rd SENATE DISTRICT	WGAB ID# 0600019
IN RE PETITION TO RECALL SENATOR PAM GALLOWAY OF THE 29th SENATE DISTRICT	WGAB ID# 0600020

SENATORS FITZGERALD, WANGGAARD, MOULTON AND GALLOWAY'S JOINT REPLY IN SUPPORT OF THEIR RESPECTIVE WRITTEN CHALLENGES TO THE RECALL PETITIONS OFFERED FOR FILING ON JANUARY 17, 2012

INTRODUCTION

The joint rebuttal offered by the Committee to Recall Scott Fitzgerald, Committee to Recall Wanggaard, Committee to Recall Moulton and Recall Senator Pam Galloway (collectively, the "Recall Committees") is long on rhetoric and hyperbole and correspondingly short on analysis of the significant legal issues raised by the Senators. Senators Fitzgerald, Wanggaard, Moulton and Galloway by this joint reply will forgo the invitation to turn these proceedings into political theater and will, instead, focus on the issues before the Government Accountability Board ("GAB" or the "Board").

ARGUMENT

I. Only Signatures Of Qualified Electors Of The Respective Senate Districts May Be Counted.

The Wisconsin Constitution is very clear on a fundamental point – recall petitions must be signed by the electors of the district represented by the officeholder they seek to recall. "The qualified electors . . . of any . . . legislative district . . . may petition for the recall of any incumbent elective officer . . . by filing a petition . . . demanding the recall of the incumbent." Wis. Const. Art. XIII, § 12 (intro). This unremarkable, fundamental requirement is restated in the recall statute: "The qualified electors . . . of any . . . legislative . . . district . . . may petition for the recall of [the] incumbent elective official." Wis. Stat. § 9.10(1)(a).

The Board has concluded that those legislative districts created by 2011 Wisconsin Act 43 ("Act 43") have been in effect since August 24, 2011 for representational purposes. The procedure by which the Board reached this conclusion does not appear to be in dispute, as the Recall Committees acknowledge that GAB staff members presented their analysis to the Board at its November 9, 2011 meeting and the Board adopted the staff analysis "as its own determination." (Recall Committees' Brief In Opposition To Written Challenges (hereafter, "Comms.' Br.") at 6 n.2.)

The staff analysis of the Recall Committees reference principally consisted of two separate, but related, memoranda.[1] The first is a memorandum dated October 19, 2011 from Kevin Kennedy, GAB's Director and General Counsel, to the Chief Clerks of the Wisconsin Senate and Assembly on the subject of "Legislative Redistricting: Effective Date and Use of State Funds" (the "October Memo"). The second is a memorandum from Mr. Kennedy to the Members of the Board, prepared for the Board's November 9, 2011 meeting on the subject of

[1] For the Board's convenience, copies of these memoranda, as they were presented in the Board's November meeting materials, are attached hereto as Exhibit A.

"2012 Redistricting Issues" (the "November Memo"). These two memos, collectively, identify a conundrum of sorts that GAB specifically addressed – Act 43 became effective in August 2011 for representational purposes, but will not become effective for purposes of conducting any election until November 2012.

As explained next, the Recall Committees are simply wrong in their assertion that the only issue implicated by the August 24, 2011 effective date was "whether an incumbent could properly use tax dollars to fund communications with people who may become the incumbent's constituents in November 2012." Comms.' Br. at 6.

A. The Board Conclusively Determined That Each Senator Represents Those Electors Who Reside In The Districts Created By Act 43.

The breadth of GAB's effective date determination – with respect to representation – is undeniably all-encompassing. Section 2 of the October Memo is titled: "Initial Applicability Date with Respect to Communication and Representation of Constituents: August 24, 2011." Oct. Memo at 3. Subsection 2.b.i. is similarly titled: "2011 Wisconsin Act 43 is effective as of August 24, 2011 for representation purposes." *Id.* Staff noted that even if the districts created by Act 43 "do not take effect for election purposes" until some later date, Act 43 could still be "effective for other purposes before that date," and concluded that "the Legislature intended to effectuate the Act on [August 24, 2011] for purposes of representation." *Id.* at 4.

The November Memo erased any possible doubt about the issue, stating unequivocally that "staff has concluded that ***legislators began representing their new districts on August 24, 2011***." Nov. Memo at 1 (emphasis added). Staff also noted that having different effective dates with respect to elector representation and the conduct of elections "creates a unique set of issues in the current political climate due to public statements that recall petitions against several state senators may be initiated prior to the 2012 General Election." *Id.* at 2. Nevertheless, this unique

set of issues does not change the *constitutional* and corresponding statutory command that a recall petition must be signed by the electors in the legislative district that the incumbent represents.

B. The Board Similarly Concluded That Recall Elections, If Any, Held Prior To November 2012 Must Be Conducted Using The Former Legislative Districts.

As the Recall Committees note, Act 43 includes a specific provision that states that it "first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election." Act 43, § 10(2). GAB has concluded that this provision of Act 43 requires that any recall election "contested prior to the 2012 General Election must be *conducted* using the legislative district boundaries which existed prior to the enactment of Act 43." Nov. Memo at 2 (emphasis added). GAB staff noted that its conclusion in this regard raised a host of questions regarding the wisdom of conducting elections utilizing the former legislative district boundaries, particularly after the Spring Primary and Spring General elections, when all local election officials will have transitioned to new ward boundaries. *Id.* Nevertheless, GAB concluded that this result – and any attendant confusion – is required by the terms of Act 43. *Id.* This conclusion, however, is not dispositive of which electors are eligible to sign a recall petition pursuant to the Wisconsin constitutional provision.

C. Even If The Board Maintains That Recall Elections Should Be Conducted In The Former Legislative District Boundaries, The Recall Petitions Must Be Signed By Electors Within The Boundaries Established By Act 43.

The Board's determination regarding the use of the former legislative district boundaries for the conduct of a future recall election becomes relevant only in the event that the Board first finds one or more of the Recall Petitions to be sufficient. As the Board noted, the State is faced with a "unique set of issues" created by the dual effective dates of Act 43. At this stage of the proceedings, the constitutional mandate clearly compels the Board to evaluate the Recall

Petitions based on residence within the districts created by Act 43. There is simply no way that GAB can on the one hand conclude that Senator Fitzgerald, for example, has been representing the electors of the 13th Senate District created by Act 43 since August 24, 2011 and on the other hand accept as sufficient a recall petition signed by electors that reside outside that district.

Such a result directly contravenes the constitutional command that the qualified electors of any legislative district may petition for the recall of the incumbent legislator. Wis. Const. Art. XIII, § 12 (intro). Furthermore, no provision of Act 43 or of Wis. Stat. § 9.10 authorizes, much less compels, GAB to accept as sufficient a recall petition signed by electors of a different district.

The question of where any recall election should be conducted becomes relevant only after the Board has made its determination of sufficiency or insufficiency.[2] Wisconsin's recall statute clearly differentiates between the recall petition process and the conduct of a recall election. The recall petition process involves the registration of the recall petitioner, followed by petition circulation, offering the petition for filing and the filing officer's review of the petition and any related challenges. The petition process culminates in a determination of sufficiency or insufficiency, and this final step of the recall petition process triggers, if appropriate, the beginning of the recall election process. Wis. Stat. § 9.10(3)(b) ("If the [Board] finds that the petition is sufficient, the [Board] shall file the petition and call a recall election to be held on the Tuesday of the 6th week commencing after the date of filing of the petition.") Thus, it is the

[2] In the event the Board determines that one or more of the Recall Petitions is sufficient, GAB or the Courts will need to determine whether holding an election in the former legislative districts is constitutionally permissible. Indeed, due to the conclusion of the 2010 census and the adoption of Act 43 there is little doubt that the former legislative districts are unconstitutionally malapportioned. As such an election in those districts would undermine the constitutional guaranty of one person one vote, *See* Baker v. Carr, 369 U.S. 186 (1962), and will impair the representative democracy established by Wisconsin's constitution (Wis. Con. Art. IV. Sec. 5 & Art. III, secs. 1&3) by allowing unrepresented electors the right to vote for a Senator and at the same time denying certain electors who are represented electors the right to vote for their Senator.

determination of sufficiency and the filing of the petition that sets in motion the recall election mechanism. Indeed, prospective candidates may not begin circulating nomination papers until after a recall petition is filed and an election called.

In the absence of the unique set of issues that the Board identified last fall, the transition from the recall petition process to the recall election process would be seamless and straightforward. But that is not the case under the present circumstances, and to review the sufficiency of the Recall Petitions as if Act 43 were not currently in effect for purposes of representation and, thus, incumbency, would require GAB to act in direct contravention of the state Constitution.

Any signature affixed to one of the Recall Petitions that was made by an elector who resides outside of the respective Senate District created by Act 43 may not be counted. Such signatures violate the statutory and constitutional command that the recall petition be brought by the electors of the legislative district represented by the incumbent.

II. The Recall Statutes Set Forth A Number Of Mandatory Requirements That Cannot Be Ignored In Favor Of Substantial Compliance, Including The Prohibition On Prematurely Circulating A Recall Petition.

The Recall Committees suggest that all provisions of the recall statute are directory in nature and subject to a standard of substantial compliance. Comms.' Br. at 2. While it is true that certain statutory provisions relating to recall petitions are directory, it is a misstatement of the law to suggest that every requirement set forth in Wis. Stat. § 9.10 is subject to mere substantial compliance. Indeed, statutory provisions governing the timing of filing election related petitions are mandatory in nature. *State ex rel. Ahlgrimm v. State Elections Board*, 82 Wis. 2d 585, 595-96, 263 N.W.2d 152 (1978).

Wisconsin's recall statute states unequivocally that "[n]o petitioner may circulate a petition for the recall of an officer prior to completing registration." Wis. Stat. § 9.10(2)(d).

GAB has no authority to count any signature that is collected prior to registration. Wis. Stat. § 9.10(2)(e)2. Because the consequence of failing to complete registration prior to circulation is that all signatures prematurely collected are void, the registration requirement is a mandatory provision of the recall statute. *Ahlgrimm*, 82 Wis. 2d at 594 (explaining that "[t]he difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void . . ."). Wis. Stat. § 9.10(2)(d) is replete with mandatory provisions, including:

- "No petition may be offered for filing . . . unless the petitioner first files a registration statement . . ."
- "No petitioner may circulate a petition for the recall of an officer prior to completing registration. . ."
- "The last date that a petition . . . may be offered for filing is 5 p.m. on the 60th day commencing after registration."
- "After the recall petition has been offered for filing, no name may be added or removed."

As each of the Senators noted in their respective Written Challenges, the registration procedure is not "completed" until a GAB representative reviews the registration statement and accepts it. Specifically, GAB, as the filing officer, must inspect the registration statement and either reject it as insufficient, conditionally accept it and notify the registrant of minor errors or insufficiencies that must be corrected within fifteen days or accept it unconditionally. Wis. Admin. Code § GAB 6.02. Thus, the statute expressly prohibits circulation prior to the completion of registration and the GAB has established a process by which such completion is to occur.

The Recall Committees do not dispute this requirement or the consequence of violating it. Rather, they argue that the recall statute only recognizes days as a unit of time measure. Comms.' Br. at 7-8. As an initial matter, the assertion is wrong. Indeed, the statutory deadline

for submitting any recall petition is "5:00 p.m. on the 60th day commencing after registration." Wis. Stat. § 9.10(2)(d). This is so regardless of the filing officer's normal business hours. More fundamentally, the Recall Committees' assertion that the actual time of registration is irrelevant would require that GAB read the word "completing" out of the statue. This is not permissible. *State ex. rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58 ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage")

Likewise, it would mean that a recall petitioner could circulate a recall petition for an entire day, register with the filing officer just prior to the close of business on that day and still meet the mandatory requirement that no petitioner may circulate a petition for the recall of an officer prior to completing registration. The plain language of the statute does not allow for such a strained interpretation. *Id.*

The Recall Committees' other substantive response to challenges that signatures were collected prior to completing registration is to point out the complete futility of an officeholder attempting to challenge signatures in the first instance. Indeed, the only reason the officeholders cannot identify which specific signatures were collected prior to the completion of registration is because the Recall Committees failed to provide the time the signatures were made. Importantly, the Recall Committees do not assert that they waited until registration was completed before circulating the Recall Petitions. Instead, they rely on a deficiency of their own making to claim that the Senators failed to identify which specific signatures the petitioners collected prematurely.

III. The Board Must Review The Remaining Challenges To Determine Which Signatures Must Be Stricken As Invalid Pursuant To Wis. Stat. § 9.10(2).

The Recall Committees disagree with certain individual challenges made by the Senators. Each of the four Senators has presented his or her challenges and the respective Recall Committees have presented rebuttal. GAB now has the task of analyzing the challenges and rebuttals[3] and, in addition to resolving the legal issues presented, determine whether a sufficient number of signatures have been presented on the Recall Petition. This is the process established by the Legislature pursuant to Wis. Stat. § 9.10(3)(b), and the Senators' decision to participate in that process is entirely proper.

Finally, it bears noting that the only meaningful safeguard to the validity of the recall petition process is the integrity of the individual circulators and the veracity of their respective certifications. Each individual circulator is required to certify as follows:

> I personally circulated this recall petition and personally obtained each of the signatures on this paper. I know that the signers are electors of the jurisdiction or district represented by the officeholder named in this petition. I know that each person signed the paper with full knowledge of its content on the date indicated opposite his or her name. I know their respective residences given. I support this recall petition. I am aware that falsifying this certification is punishable under § 12.13(3)(a), Wis. Stats.

Such a certification is specifically required by Wis. Stat. § 8.40(2).

It is apparent that in many instances the seriousness of the certification – including the reference to § 12.13(3)(a), which makes falsifying the certification a Class I felony – provided no deterrent to circulators intent on falsely certifying signatures. It is equally apparent that many signers gave no thought to fraudulently signing the Recall Petitions. The Senators, working in

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[3] GAB's administrative task has been made more difficult by the fact that the Recall Committees deleted thousands of rows from the spreadsheets containing the Senators' challenge data. For example, in support of her written challenge Senator Galloway submitted a data file with 5,502 rows of data, yet the spreadsheet that accompanied Recall Senator Pam Galloway's rebuttal included less than 4,000 rows. It is unclear at this late hour which rows the Recall Committees deleted from each data file, or why.

conjunction with Committee to Elect a Republican Senate, shared data files relating to the Recall Petitions and found a significant number of individuals who cavalierly signed *each* of the Recall Petitions against Senators Wanggaard, Moulton and Galloway, and a number of other individuals who signed at least two of the Recall Petitions. It is doubtful that these signers were confused about what they were doing, since many of them signed multiple petitions on the same day.

More striking is the reality that a number of circulators falsely certified identical signatures on multiple Recall Petitions – many on the same day – despite the fact that the signers did not reside in *any* of the relevant Senate Districts. A list of some of the individual signers that signed multiple Recall Petitions is attached hereto as Exhibit B, along with a sampling of various petition pages that include patently false certifications. For example, the circulator of page number 2474 of the Wanggaard petition, page number 2272 of the Moulton petition and page number 1607 of the Galloway petition lives in Wisconsin Rapids, in the 24th Senate District. She falsely certified her own signature, as well as the signatures of two other Wisconsin Rapids-area residents on all three Recall Petitions. See Ex. B, Tab B-3. Exhibit A includes numerous other examples from areas of the state as diverse as Door County (Tab B-2), Cashton (located in Monroe County) (Tab B-7) and Mequon (Tab B-5). These false certifications call into question the petition process, because in the absence of a reliable certification there is no other evidence that they were "circulated in a manner that protects against fraud." *In re Jensen*, 121 Wis. 2d 467, 469-70, 360 N.W.2d 535 (1984).

Adding to the disappointment that GAB and the residents of this State should feel regarding this blatant disregard for state law, is the fact that the Recall Committees were perfectly willing to submit such obviously invalid petition pages as part of the Recall Petitions. It is remarkable, for instance, that the Committee to Recall Wanggaard would find it acceptable to submit a petition page containing only signatures corresponding to Wisconsin Rapids

addresses (or Stevens Point or Mequon) for a Senate District located in the Racine area. Yet, that is exactly what they did.

The only way that integrity can be returned to this process is if GAB refers these individuals for prosecution.

CONCLUSION

For the reasons set forth above and in their previous submissions, the Senators respectfully request GAB eliminate all invalid and inadequate signatures from the four petitions. Moreover, the Senators request that GAB evaluate the sufficiency of the petitions in the legislative districts created by Act 43.

Dated this 15TH day of February, 2012.

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